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Supreme Court, U.S.
FILED
(1)
08-357 SEP 17 2008

No. 07-1979 OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SAMUEL R. HOGSETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the district court violated Petitioner's Sixth Amendment right to confront a key witness against him when voir dire revealed the foundation for such questioning and where the district court, based on its in camera assessment that the witness's actual answers would not be favorable to Petitioner, prevented completely Petitioner's trial counsel from cross-examining the key witness in front of the jury regarding a particular source of the witness's potential pro-prosecution bias.

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE PETITION 6

I. THE SEVENTH CIRCUIT'S OPINION CONFLICTS WITH THIS COURT'S CONFRONTATION CLAUSE JURISPRUDENCE IN THAT IT IMPROPERLY SANCTIONS JUDGE-BASED CREDIBILITY DETERMINATIONS WITH RESPECT TO WITNESSES WHO POSSESS OBJECTIVE GROUNDS FOR HOLDING A PRO-PROSECUTION BIAS 8

A. The Seventh Circuit's holding conflicts with this Court's decision in *Delaware v. Van Arsdall* 8

B. The Seventh Circuit's decision establishes a precedent whereby courts can use a high-threshold test of good-faith to deny a line of questioning about a witness' potential bias, thereby achieving an end run around this Court's established Confrontation Clause jurisprudence. 13

CONCLUSION 24

APPENDIX

Appendix A (*United States v. Taylor*, 522 F.3d 731 (7th Cir. 2008)).

Appendix B (*United States v. Hogsett*, No. 05-30196 WDS, T. Tr. Vol. II, 29-31, Jan. 10, 2007)

Appendix C (*United States v. Hogsett*, No. 07-1939 (7th Cir. June 30, 2008) (order))

TABLE OF AUTHORITIES

CASES — Page(s)

Davis v. Alaska,
415 U.S. 308 (1974) 8, 9, 13

Delaware v. Van Arsdall,
475 U.S. 673 (1986) 6, 7, 8, 9

Henry v. Speckard,
22 F.3d 1209 (2d Cir. 1994) 12, 13

Searcy v. Jaimet,
332 F.3d 1081 (7th Cir. 2003) 16, 17, 18

United States v. Sampol,
636 F.2d 621 (D.C. Cir. 1980) 15

United States v. Taylor,
522 F.3d 731 (7th Cir. 2008) 1, 5, 8, 11, 13

CONSTITUTION

U.S. Const. amend. VI 1, 8

STATUTES

18 U.S.C. § 3231 3

18 U.S.C. § 922(g)(1) 3

18 U.S.C. § 924(c) 3

21 U.S.C. §§ 841(a)(1), (b)(1)(B) 3

28 U.S.C. § 1254(1) 1

Petitioner Samuel R. Hogsett respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals was consolidated with another case and is reported as *United States v. Taylor*, 522 F.3d 731 (7th Cir. 2008). (App. A.) The opinion of the district court denying Petitioner's motion in limine is unreported. (App. B.)

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on April 3, 2008. The Court of Appeals denied a timely motion for rehea ring and re hearing en banc on June 30, 2008. (App. C.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution states that: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. U.S. Const. amend. VI.

STATEMENT OF THE CASE

On the evening of July 16, 2005, Petitioner drove his car through East Alton, Illinois with Ms. Tyesha

Ford riding in the passenger's seat. East Alton Police Officer Christian Cranmer testified later that the rear license plate of Mr. Hogsett's car did not appear to be illuminated. Upon noticing this, Officer Cranmer activated his overhead light bar and pursued and pulled over Mr. Hogsett. Unaware of Ms. Ford's presence at the beginning of the traffic-stop, Officer Cranmer instructed only Mr. Hogsett to exit his vehicle. Mr. Hogsett complied. Standing at the rear of the car, Officer Cranmer reviewed Mr. Hogsett's identification and then asked if he had anything illegal in the vehicle. Mr. Hogsett responded that he did not. Officer Cranmer remained unaware of Ms. Ford's presence in the vehicle during this initial discussion.

Shortly after the commencement of this exchange, Patrolman David Shook and Officer Michael McCormick arrived on the scene. Neither McCormick nor Shook were aware of Ms. Ford's presence or observed what she was doing inside the car until Patrolman Shook sought to secure the vehicle so that it could be searched.

When Ms. Ford got out of the car, Officer Cranmer observed two small, plastic baggies on the passenger seat, where Ms. Ford had been sitting. Patrolman Shook testified that "as she stood up to exit the vehicle," he observed "two small packages of what appeared to be crack cocaine fall from between her legs and onto the passenger seat that she had been sitting in." (T. Tr. Vol. I, 85.) Together the two baggies contained approximately one half gram of cocaine.

Mr. Hogsett and Ms. Ford were detained immediately, and Officer Cranmer searched the car. During the course of his search, Officer Cranmer found a .22 caliber pistol on the passenger's side of the car interior. (T. Tr. Vol. I, 40–43, 88–89.) None of

the officers witnessed Mr. Hogsett in physical possession of the narcotics or the firearm. (T. Tr. Vol. I, 53, 62, 97.)

The Bureau of Alcohol, Tobacco, and Firearms (the "BATF") became involved in Mr. Hogsett's case in early November 2005. During the period between Mr. Hogsett's arrest and his trial in January 2007, Ms. Ford faced three state-court arrest warrants that were either recalled, quashed, or dismissed. Notwithstanding the outstanding arrest warrants, Ms. Ford participated in the Government's pre-trial investigation of Mr. Hogsett, and testified as a government witness. (T. Tr. Vol. II, 13–20.)

More particularly, Ms. Ford was charged on June 30, 2005, with a misdemeanor count of domestic battery and bodily harm. A warrant was issued for her arrest on October 4, 2005. BATF Special Agent Paul Heiser apparently first met with Ms. Ford on November 21, 2005. Special Agent Heiser was informed by an East Alton Police Detective named Paletto that Ms. Ford had an active warrant outstanding against her. (T. Tr. Vol. II, 27.) Special Agent Heiser responded to Detective Paletto, in sum or substance, that "because it's within your police department, whatever you can do, you need to take care of as far as she's here, if you want to arrest her, whatever you want to do." (T. Tr. Vol. II, 27.) In an order dated November 18, 2005, a state court ordered a recall of the arrest warrant and released Ford on a $5000 recognizance bond. The charge was dismissed on January 10, 2006.

Arrest warrants for two companion crimes were issued to the Alton Police Department on December 12, 2006, based on Ms. Ford's failure to appear in two state-court misdemeanor cases (one involving property damage, and the other a battery). The warrants remained pending until January 3, 2007,

i.e., one week before Ms. Ford testified at Mr. Hogsett's trial, at which time one of the warrants was quashed, and the other recalled with the hearing date reset until after Mr. Hogsett's trial. (T. Tr. Vol. II, 4–7.) Ms. Ford was not represented by counsel during this period.

On March 22, 2006, the government charged Mr. Hogsett with the unlawful possession of a firearm by a felon, 18 U.S.C. § 922(g)(1); possession with intent to distribute a controlled substance, 21 U.S.C. §§ 841(a)(1), (b)(1)(B); and possession of a firearm in furtherance of a drug-trafficking crime, 18 U.S.C. § 924(c). The jurisdiction of the district court was invoked under 18 U.S.C. § 3231.

In a voir dire held outside the presence of the jury, Mr. Hogsett's trial counsel moved to cross-examine Ms. Ford in court about the warrants. To support this motion, counsel presented information to the district court demonstrating the coinciding dates of when the warrants had been deferred or quashed and when Ms. Ford had conversations with law enforcement concerning Mr. Hogsett's indictments. The district judge and counsel for the parties examined Ms. Ford and Special Agent Heiser. Ms. Ford testified that the outstanding warrants turned up in a background search performed by her employer. She testified she needed to address the warrants "because my job wouldn't let me go back to work without the warrants being clear." (T. Tr. Vol. II, 19.) Ms. Ford raised the outstanding warrants with Special Agent Heiser, in substance telling him that she worried the warrants would prevent her from attending court to testify because she might be arrested. (T. Tr. Vol. II, 22.)

The district court heard testimony from Special Agent Heiser that after learning this information, both he and Officer Paletto again discussed the

warrants outstanding against her. (T. Tr. Vol. II, 25.) Officer Paletto contacted the clerk's office about the warrants. Special Agent Heiser instructed Ms. Ford to contact the Alton Police Department about the warrants, and told her that she "had to clear that up." (T. Tr. Vol. II, 22–23.) Ms. Ford thereafter spoke with Detective Paletto and, on his instruction, went to the county clerk's office. Ms. Ford testified that the clerk was expecting her when she arrived, and informed her that notice of a new court date would be mailed to her. (T. Tr. Vol. II, 20.)

During this voir dire, Ms. Ford testified that Special Agent Heiser did not tell her that he would take care of the warrants for her. Special Agent Heiser denied that Ms. Ford asked him to take care of any warrants, and he denied that he told Ms. Ford he would see that her warrants were recalled, or quashed, or the case dismissed provided she cooperated with the Government.

In seeking permission to cross-examine Ms. Ford in front of the jury about the warrants and their disposition, trial counsel argued that Ms. Ford's ability to remain free, notwithstanding the remaining warrant, represented a potential or perceived benefit conferred as a result of her participation in the prosecution. At the close of the voir dire, Judge Stiehl concluded that he had not "seen or heard any evidence of an actual attempt to offer . . . to this witness . . . any benefit or any other . . . inducement" to testify against Mr. Hogsett, and barred any in-court inquiry into the warrants. (T. Tr. Vol. II, 29–30.)

Hogsett was convicted by the jury on all counts. On appeal, his case was consolidated with another for decision. *United States v. Taylor*, 522 F.3d 731 (7th Cir. 2008). Affirming the district court, the

Seventh Circuit's opinion addressed the Sixth Amendment issue by stating:

> The judge did not abuse his discretion in barring this line of questioning. You are not permitted to cross-examine a witness about a particular topic without a good-faith belief that the answers will be helpful to your case, as distinct from hoping that the question alone will insinuate a helpful answer ("are you not testifying against the defendant because you believe the prosecutor helped to quash the state warrants against you?"). *United States v. Adames*, 56 F.3d 737, 745 (7th Cir.1995); *United States v. Guay*, 108 F.3d 545, 552-53 (4th Cir.1997). If there is an objection at trial to a question asked on cross-examination, on the ground that there is no good-faith basis for it, and at a sidebar the judge so finds, he must sustain the objection. That in effect is what the judge did here, when the hearing revealed the shot-in-the-dark nature of the proposed cross-examination.

Taylor, 522 F.3d at 736.

REASONS FOR GRANTING THE PETITION

An exercise of this Court's supervisory jurisdiction is warranted because the Seventh Circuit's decision conflicts with this Court's decision in *Delaware v. Van Arsdall*, despite the striking similarity between the facts of the two cases. 475 U.S. 673 (1986). In that decision, this Court held that, in a criminal prosecution, cutting off all inquiry into an important avenue of pro-prosecution bias

was a violation of a defendant's rights under the Confrontation Clause of the Sixth Amendment. In addition, the Seventh Circuit formulated a threshold for the good-faith test in an evidentiary context that conflicts with the substantially lower threshold used in the Second Circuit, and created precedent for using that higher bar to circumvent this Court's Confrontation Clause jurisprudence.

The Seventh Circuit's opinion below is fundamentally at odds with this Court's Confrontation Clause jurisprudence. For purposes of cross-examination, it pins a good-faith analysis on the witness's anticipated and actual answers. This ruling could have an immediate impact on all individuals prosecuted for federal crimes in the Seventh Circuit. If adopted in subsequent cases, the Court of Appeal's reasoning effectively cripples a criminal defendant's method and means of establishing witness bias through cross-examination.

Furthermore, the decision usurps and marginalizes the role of the jury in criminal prosecutions, placing the inferences to be drawn from a witness's demeanor and responses to questions posed on cross-examination in the hands of the judge. Thus, the constitutional rights of every criminal defendant prosecuted in the Seventh Circuit -- as well as every criminal defendant being prosecuted in a court that adopts the Seventh Circuit's reasoning -- are at stake.

I. THE SEVENTH CIRCUIT'S OPINION CONFLICTS WITH THIS COURT'S CONFRONTATION CLAUSE JURISPRUDENCE IN THAT IT IMPROPERLY SANCTIONS JUDGE-BASED CREDIBILITY DETERMINATIONS WITH RESPECT TO WITNESSES WHO POSSESS OBJECTIVE GROUNDS FOR HOLDING A PRO-PROSECUTION BIAS.

A. The Seventh Circuit's holding conflicts with this Court's decision in *Delaware v. Van Arsdall*

A court violates a defendant's rights under the confrontation clause when it cuts off all questioning about events that might lead a jury to reasonably conclude that a witness has a motive for favoring the prosecution in his testimony. *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). In affirming the trial court's decision, the Seventh Circuit effectively approved just such a violation.

In *Van Arsdall*, this Court reviewed a decision by the Supreme Court of Delaware that reversed a Delaware trial court on the ground that the trial court violated a criminal defendant's right to confront a witness. Based on an in camera witness examination by the court, the trial court issued an order in limine barring any cross examination of a witness about the dismissal of a criminal charge against him. 475 U.S. at 676. The trial court held a hearing outside the presence of the jury. *Id.* Although *the hearing adduced evidence that there had been a quid pro quo between the witness and the prosecution*, the witness denied that the agreement had affected his testimony. *Id.* at 676-77.

This Court agreed with the Supreme Court of Delaware that the order violated the defendant's rights under the Confrontation Clause. *Id.* at 679. Although a court may place reasonable limits "on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant," cutting off all inquiry into an important avenue of potential pro-prosecution bias, where there is evidence of an event from which a jury might reasonably conclude that the witness had a motive to favor the prosecution in his testimony, violates the criminal defendant's rights under the Confrontation Clause. *Id.*

In conflict with this Court's finding of a Confrontation Clause violation in *Van Arsdall*, and on a remarkably similar set of facts, the Seventh Circuit affirmed the trial court's decision to bar questioning of a key witness about an important avenue of possible pro-prosecution bias in the case at hand. *United States v. Taylor*, 522 F.3d 731, 736 (7th Cir. 2008). As in *Van Arsdall*, the trial court ruled in limine on the basis of an in camera examination of witnesses. Although there was no admission of a quid pro quo in the instant case, there was testimony that the witness had three warrants outstanding for her arrest, and that two law enforcement agents involved in prosecuting the defendant acted on two separate occasions to help the witness take care of those warrants. Two of the warrants had turned up when the witness's employer ran a background check, and she was told that she would not be allowed to start work until she took care of them. As in *Van Arsdall*, the in camera examination adduced evidence from which a reasonable jury might draw the inference that the witness's testimony was colored by a perceived quid pro quo.

The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. This guarantee extends not only to a defendant's right to physically confront the witnesses against him, but also, the right to cross-examine those witnesses. *See Van Arsdall*, 475 U.S. at 678. As this Court has explained, "'the exposure of a witness's motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.'" *Id.* at 678-69 (quoting *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974)). A criminal defendant must have the opportunity to expose facts from which the fact-finder may "appropriately draw inferences" relating to the witnesses' reliability. *See Davis*, 415 U.S. at 318. More specifically, the Confrontation Clause *requires* that a criminal defendant have the opportunity to demonstrate bias on the part of the Government's witnesses. *See id.* at 316-17.

In affirming the trial court's denial of a criminal defendant's right to question a key witness about an important avenue of potential pro-prosecution bias, despite an in camera hearing that demonstrated evidence from which a reasonable jury might infer such bias, the Seventh Circuit effectively approved a violation of Mr. Hogsett's Sixth Amendment right to confront the witnesses against him, contrary to this Court's holding in *Van Arsdall*.

The trial court's violation of Mr. Hogsett's Sixth Amendment rights cannot be said to be harmless error. This Court has set out the framework upon which courts should build their harmless-error analysis in this context.

> The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might

> nonetheless say that the error was *harmless beyond a reasonable doubt.* Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Van Arsdall, 475 U.S. at 684 (emphasis added).

Ms. Ford's testimony was crucial to the government's case against Mr. Hogsett. The government had the burden to prove beyond a reasonable doubt both that Mr. Hogsett possessed the cocaine found in the car with intent to distribute (Count II), and thus that the firearm possessed by him (Count I) was possessed in furtherance of a drug-trafficking crime (Count III). Ms. Ford provided the only direct evidence that it was Mr. Hogsett who possessed the drugs and the gun. Ms. Ford provided the only direct evidence that Mr. Hogsett *intended to sell* the 0.5 grams of cocaine found in his car. No other witnesses at trial offered any direct testimony regarding Mr. Hogsett's "intent to deliver" on the day of his arrest.

The reliability and credibility of Ms. Ford's testimony on these topics were of paramount importance to the Government's case against Mr. Hogsett. She was the sole witness who did not have an established criminal record and who testified that she had seen Mr. Hogsett sell drugs. Further, she

was the only witness who had a familial relationship to Mr. Hogsett, thus adding damning weight to her testimony against him. Any information that might have undermined Ms. Ford's reliability or credibility in the eyes of the jury, including her demeanor and response to questions regarding accommodations she received (or perceived she had or might receive) in connection with her state criminal proceedings, were of critical importance to Mr. Hogsett's defense.

Moreover, the record suggests that the jury was clearly troubled by Ms. Ford's credibility. During deliberations, the district court received from the jury a note with three questions. Included was a request to see "Tyesha Ford's handwritten statement to the East Alton Police, and the typed transcript testimony given later." (T. Tr. Vol. IV, 67.) Given the weight of Ms. Ford's testimony and the apparent role it played during deliberations, the jury would have received a significantly different impression of her credibility had it been given the opportunity to consider the important avenue of bias that was excluded. Indeed, the pending warrants, the accommodations afforded her in connection with those warrants, the timing and substance of her communications with law enforcement, and the concerns she expressed over her employment situation, all gave her a distinct and particular motive to fabricate or slant her testimony in connection with Mr. Hogsett's conviction for possession with intent to distribute less than 0.5 grams of cocaine.

B. The Seventh Circuit's decision establishes a precedent whereby courts can use a high-threshold test of good-faith to deny a line of questioning about a witness' potential bias, thereby achieving an end run around this Court's established Confrontation Clause jurisprudence.

Rather than address petitioner-defendant's claims of a Confrontation Clause violation, the Seventh Circuit decided the appealed issues on the ground that counsel had no good-faith basis for questioning the key witness about this particular avenue of possible pro-prosecution bias. *Taylor*, 522 F.3d at 736. In so doing, the court effectively created precedent by which a criminal defendant's Sixth Amendment rights might be bypassed under the guise of a determination that there is no good-faith basis for a particular line of questioning.

In affirming the trial court, the Seventh Circuit formulated the good-faith basis test as follows:

> You are not permitted to cross-examine a witness about a particular topic without a good-faith belief that the *answers will be helpful to your case*, as distinct from hoping that the question alone will insinuate a helpful answer ("are you not testifying against the defendant because you believe the prosecutor helped to quash the state warrants against you?").

Taylor, 522 F.3d at 736 (emphasis added). The Seventh Circuit thus applied a standard that forbids a line of questioning where witnesses facially deny a proposition to be the case. It is not enough that an attorney has a good-faith belief based on inferences that might reasonably be drawn from other

admissible evidence. The Seventh Circuit applied a standard that requires an attorney to have a good-faith belief that a witness's answers will *directly* support the proposition the attorney is seeking to prove.

The Seventh Circuit's formulation of the good-faith threshold in an evidentiary context directly conflicts with the standards used by other circuits. The Second Circuit held in *Henry v. Speckard* that it was error for a trial court to prevent a line of questioning into an important avenue of potential bias merely because the witness facially denied that the bias existed. 22 F.3d 1209 (2d Cir. 1994).

> Although a party may not prove an issue on which he has the burden of proof by simply calling the opposing party to the stand, posing the pertinent questions, and urging the jury to disbelieve the witness's unfavorable answers, it is entirely open to a party to try to counter his opponent's case by asking questions designed to expose, *inter alia*, an opposing witness's bias. The witness may well answer bias-probing questions in the negative; but the matter of whether her answers should be believed or disbelieved is within the sole province of the jury.

Id. at 1215 (citations omitted).

In *Speckard*, the defense sought to question the complainant about whether she felt resentment towards the defendant because she was frequently asked to baby-sit her younger siblings. *Id.* at 1212. After the prosecution objected to the line of questioning, the defense was allowed to make an offer of proof outside the presence of the jury. *Id.* at 1212-13. The witness denied that she felt any

resentment towards the defendant, and the court barred the line of questioning. *Id.*

The Second Circuit held that it was error for the trial court to bar this line of questioning. *Id.* at 1215. The court could see "no justification in the present matter for the trial court's refusal to allow [the defense] to ask [the witness] whether she had resented being asked to baby-sit." *Id.* The defense had established that the witness had been asked to baby-sit, and this was a sufficient foundation to ask whether baby-sitting had engendered any feelings of resentment towards, and therefore bias against, the defendant. *Id.*

In the Second Circuit, therefore, by establishing that an event occurred, an attorney lays a sufficient foundation for questions about how the event affected a witness's feelings towards a criminal defendant and ultimately their motive in testifying. Once it was established that the witness had baby-sat for her younger siblings at the defendant's request, a sufficient foundation had been laid to question the witness about any resulting bias she might feel against the defendant. The line of questioning was to be allowed *even though* the witness facially denied the existence of bias during the hearing outside the presence of the jury. Whether or not the witness's answers should be believed or disbelieved was "within the sole province of the jury." *Id.*

Under the Seventh Circuit's formulation of the good-faith threshold, *Speckard* would have come out differently. The Seventh Circuit's decision below requires a good-faith belief that the witness's "answers will be helpful to your case." *Taylor*, 522 F.3d at 736. Had this threshold applied in *Speckard*, the fact that the witness denied bias during the voir dire would have permitted the trial court to exclude the testimony. This runs counter to the Second

Circuit's explicit recognition that, although the witness "may well answer bias-probing questions in the negative," it is for the jury to decide whether or not to believe these denials. *Speckard*, 22 F.3d at 1215. This is the approach endorsed by this Court. The jury is the sole trier of fact and credibility, and defense counsel should be permitted to expose it to facts from which it might "appropriately draw inferences relating to the reliability of the witness." *Davis*, 415 U.S. at 318.

If the Second Circuit's analysis were applied to the facts of the instant case, the trial court would have been found in error when it excluded questions about whether the witness received, or perceived that she received, any benefit from her testimony for the prosecution. Defense counsel laid a sufficient foundation for his line of questioning.

During voir dire, Ms. Ford conceded that there had been, at various times, three warrants outstanding for her arrest. One warrant, stemming from an incident in July 2005, was recalled in November 2005 around the time Ms. Ford was interviewed by FBI Special Agent Heiser in connection with Mr. Hogsett's case. Officer Paletto ran Ms. Ford's information, and informed Special Agent Heiser that Ms. Ford had an active warrant out for her arrest. Special Agent Heiser testified during this voir dire that he told Officer Paletto that he needed to "take care" of the warrant, be it by arresting her or "whatever you need to do, you need to do that." Officer Paletto suggested that they reschedule the date of Ms. Ford's court appearance so that she would not have an active warrant when interviewed by Special Agent Heiser. The warrant was then withdrawn in November 2005. Ms. Ford testified that she had no knowledge of how this warrant was withdrawn.

The other two warrants, stemming from an incident in July 2006, were quashed in January 2007, just weeks before trial. Ms. Ford testified that she told Agent Heiser that she had a problem with "some active warrants."[1] Ms. Ford said that her new job had run a background search that turned up the warrants, and her employers told her that she needed to take care of them before they were able to employ her. Special Agent Heiser admitted in the in camera review that he spoke to Officer Paletto about the warrants, and that Officer Paletto spoke with the court clerk's office. Special Agent Heiser then told Ms. Ford to go to the clerk's office. Ms. Ford testified that, when she arrived at the clerk's office, the clerk was expecting her and gave her a new court date.

Under *Speckard*, the admission of the existence of these events would have formed a sufficient foundation to question the witness about whether she harbored any pro-prosecution bias based on the fact that, or her perception that, she received, or expected to receive, a benefit in exchange for her testimony. It would have been held an error to bar the line of questioning even though all parties involved could be expected to deny that the bias existed. By establishing that the events occurred, the defense would have laid a sufficient foundation for inquiry into their effect on the attitude of the witness towards the prosecution and the defendant. It would be for the jury to decide whether or not they believed her denials.

The D.C. Circuit has adopted a different, two-level analysis for evaluating whether questions were posed in good-faith.

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[1] It appears from the transcript that there may in fact have been a single, second warrant, covering two separate charges. (*See* T. Tr. Vol. II 4-7.)

> [D]efense counsel need not proffer a factual foundation for all questions asked on cross-examination. A well reasoned suspicion that a circumstance is true is sufficient. On the other hand, counsel must have a reasonable basis for asking questions on cross-examination which tend to incriminate or degrade the witness and thereby create an unfounded bias which subsequent testimony cannot fully dispel.

United States v. Sampol, 636 F.2d 621, 658 (D.C. Cir. 1980) (citations omitted). The D.C. Circuit thus uses two thresholds for its good-faith analysis, depending on the nature of the intended inquiry. The basic standard is very low – the attorney need only have a well-reasoned suspicion that a circumstance is true – and would appear to require only a bare minimum showing of predicate facts in order to justify *an attorney's suspicion*. This is a lower threshold than that adopted by either the Second Circuit, which requires establishment of surrounding circumstances, or the Seventh Circuit, which requires a witness's answers to directly support the proposition that the attorney is trying to prove.

The D.C. Circuit then introduced a second, more stringent threshold where an attorney's questions "tend to incriminate or degrade the witness." Under these circumstances, counsel must have a "reasonable basis" for the question, a standard similar to that used broadly by the Second Circuit. However, this higher threshold is still substantially lower than the threshold used by the Seventh Circuit, which requires testimony to directly support a proposition.

At least one judge on the Seventh Circuit has disagreed with the Seventh Circuit's standing good-

faith analysis in the context of the Confrontation Clause. In *Searcy v. Jaimet*, an Illinois trial court had denied a criminal defendant the opportunity to cross-examine two key government witnesses about their knowledge that the victim of a murder was a police informant. 332 F.3d 1081, 1086 (7th Cir. 2003). The witnesses claimed that they saw the defendant chase the victim around a corner, brandishing a gun. *Id.* at 1083-84. They testified that they saw the defendant shoot at the victim twice, then heard five more shots after the defendant and victim disappeared from sight. *Id.* The victim died at the scene. *Id.* at 1084.

The defense's theory was that these two witnesses in fact committed the murder, and that this was their motive to fabricate their testimony. *Id.* at 1084. The victim had passed information to the police about one of the witnesses, Brooks. *Id.* Brooks found out, and shot the victim in retaliation. *Id.* The other witness, Johnson, was an accomplice, according to the defense theory. *Id.*

The court conducted voir dire of the two witnesses outside the presence of the jury. *Id.* at 1085-86. During the voir dire, both witnesses facially denied any knowledge that the victim was a police informant. *Id.* at 1086. The defendant was able to adduce testimony that a neighbor of one of the witnesses, Johnson, had overheard the victim tell a police officer that the other witness, Brooks, was "a drug dealer and the one for whom the police were looking." *Id.* at 1085. Johnson admitted during voir dire that he had spoken with his neighbor during the relevant period, and that he knew the other witness, Brooks. *Id.* at 1091. Brooks became agitated enough when being asked about his knowledge of the victim's status as a police informant that the court's attempts to calm him down appeared on the record. *Id.* at 1086.

On petition for a writ of habeas corpus, the district court held that there was a "good-faith factual predicate" for questioning the witnesses about their knowledge of the victim passing incriminating information to the police. *Id.* at 1087. The Seventh Circuit reversed the district court's grant of the writ. *Id.* at 1092. Although it admitted that the trial court had required a "rather substantial" showing of facts from the defense as a predicate to allowing the line of questioning, *id.* at 1090, the circumstantial evidence that tended to show a possibility that the two witnesses knew the victim was a police informant was held to be not strong enough to find the state court in error on a habeas petition. *Id.* at 1092.

Dissenting from the majority opinion, Judge Cudahy characterized the state trial court's threshold as "a requirement that [the defendant] make a more or less conclusive showing (as an evidentiary foundation) that [the witnesses] were aware of [the victim's] informant activities." *Searcy*, 332 F.3d at 1092 (Cudahy, J., dissenting). Judge Cudahy believed that the district court had been correct in issuing the writ of habeas corpus on the ground that the state of Illinois's balancing of the defendant's Sixth Amendment right to confront the witnesses against him against the need to show an evidentiary foundation for a line of questioning "was so lopsided as to amount to an unreasonable application of Supreme Court precedent." *Id.*

> [The defendant] showed that [the victim] was about to act as an informant against Brooks. [The defendant] also showed that Johnson's neighbor had likely overheard [the victim] tell the police that Brooks should be arrested for drug dealing. Johnson even admitted to speaking with his neighbor in the relevant time period. The only piece of

> information not fully verified was whether, in fact, the critical information was transmitted from Johnson's neighbor to Johnson and Brooks.

Id. at 1094. It was "serious error," Judge Cudahy believed, to refuse the defendant the right to cross-examine the witnesses about their knowledge of the victim's activities as a police informant "simply because [the witnesses] refused to inculpate themselves on the stand." *Id.*

Compared to the facts in *Searcy*, Mr. Hogsett demonstrated much stronger circumstantial evidence to support his line of questioning about an important avenue of potential bias. Searcy was only able to introduce evidence that there was an opportunity for the witnesses to learn that the victim was a police informant. Mr. Hogsett was able to offer testimony that the witness had three warrants out against her; an admission that a police officer and an FBI Special Agent arranged the recall of one warrant, and that the police officer contacted the clerk's office about the other two warrants which was subsequently quashed. The witness also admitted that the pending warrants were preventing her from starting work with a new employer. If Judge Cudahy believed that the circumstantial evidence in *Searcy* formed enough of a foundation to support the line of questioning in that case, it is likely that he would have so found in Mr. Hogsett's case.

In sum, given the adversarial nature of a criminal prosecution, it is axiomatic that defense counsel must often ask questions during cross-examination of a witness for the prosecution knowing full well that the witness will not respond with an answer that is immediately helpful to the defense. Defense counsel nonetheless asks such questions in an effort to ferret out the truth by

exposing inconsistencies and contradiction with respect to the witness's testimony. By doing so, defense counsel collects answers and demonstrates the witness's demeanor in a manner that ultimately may depict the defendant's innocence in the eyes of the jury.

This process is of great importance to a defendant's right under the Confrontation Clause to cross-examine a witness to determine whether they harbor a particular source of bias in favor of the prosecution. For instance, on cross, the question "are you testifying today to gain favor with law enforcement authorities?" might garner nothing more than an unequivocal "no" in terms of an actual answer from the witness. The witness's demeanor in answering that question, however, particularly when confronted with facts that support a contrary inference, may suggest otherwise.

Indeed, the ultimate affect of the witness's answers on the fact-finding process, even if they take the form of unequivocal denials, depends on defense counsel's ability to ask both foundational questions and questions that support reasonable inferences in favor of the defendant. Once the foundation for a bias-probing question is established, defense counsel must be permitted, consistent with this Court's Sixth Amendment jurisprudence, to craft and pose reasonable questions designed to expose a particular source of bias through the crucible of cross-examination. Defense counsel can then use these facts and the reasonable inferences drawn therefrom to present to the jury a complete picture of the witness's testimony.

It is also self-evident that a witness's self-interest or subconscious motivations may not be apparent from any one of the witness's answers. Accordingly, for purposes of the Confrontation Clause, whether there is a good-faith basis for a line of cross-

examination cannot be determined by looking at any one or even all of the witness's potential answers. Rather, "good faith" must be viewed strictly in terms of whether a sufficient basis exists to ask the bias-probing question independent of the potential answer. Once that threshold has been passed, it is within the sole province of the jury to evaluate the credibility of that witness's testimony.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 17, 2008

APPENDIX

APPENDIX A — *UNITED STATES v. TAYLOR*, 522 F.3d 731 (7th Cir. 2008)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 06-4112

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TYREESE R. TAYLOR,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 06 CR 105—**Barbara B. Crabb**, *Circuit Judge*

No. 07-1939

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SAMUEL R. HOGSETT,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 05-30196-WDS—**William D. Stiehl**, *Judge*

Appendix A

ARGUED JANUARY 24, 2008—DECIDED APRIL 3, 2008

Before POSNER, RIPPLE, and TINDER, *Circuit Judges.*

POSNER, *Circuit Judge.* We have consolidated for decision two appeals presenting overlapping issues under Rule 404(b) of the Federal Rules of Evidence, which governs the admissibility of evidence of previous crimes or other "bad acts." Tyreese Taylor and Samuel Hogsett were convicted in separate trials of distributing crack (Hogsett was also convicted of a gun offense) and sentenced to 240 and 355 months in prison, respectively.

Rule 404(b) forbids the use of prior convictions or other evidence of bad acts to prove that the defendant has a propensity to commit crimes. But it allows such evidence to be presented (in the discretion of the trial judge, balancing probative value against prejudice to the defendant under Fed.R.Evid. 403) to prove other, material facts, including criminal intent, identity, and absence of mistake. Taylor's lawyer told the judge before the trial began that he was going to request an instruction that would permit the jury to convict his client of the lesser offense of possession of crack for personal use rather than for sale. The judge ruled that the request opened the door to the government's presenting evidence of Taylor's prior conviction of possession of crack with intent to distribute it. But after the lawyers' opening statements to the jury, Taylor's lawyer withdrew the request for a lesser-included instruction, and the judge told the prosecutor that he could introduce evidence of prior bad acts, to rebut an

inference that Taylor possessed drugs only for his personal use, only if the defendant opened the door to such evidence in some other way during the trial. The defendant did not do that.

The judge did allow the persons who had bought crack from Taylor in transactions that he was accused in this case of having made to testify that they knew from prior dealings with him that he was indeed a crack dealer. That evidence, like the prior conviction, related to his intent to distribute crack rather than to possess it just for personal use. He did not make an issue of intent, as we have just seen, but the buyers' evidence of prior dealings with him also related to identity; the evidence explained how they knew and thus could identify him. Although no one questioned these witnesses' ability to identify him as the person from whom they had bought crack in the transactions charged by the prosecution, we hesitate to pronounce the admission of their testimony of prior dealings with him a violation of Rule 404(b). The fact that a defendant pleads not guilty does not provide many clues to the specific attacks that he will mount against the government's case. Unless the government is allowed to present some evidence about previous transactions between the government's witnesses and the defendant, the transactions alleged in the government's current case could be challenged in the defendant's closing argument as unworthy of belief, especially since the buyer witnesses would be criminals who might be hoping for lenity by testifying for the government. It would be too late for the government to attempt to rehabilitate

those witnesses. (We shall give another and clearer example of this sandbagging concern when we discuss Hogsett's appeal.)

The evidence that Taylor was known to be a seller of illegal drugs also explained why the government's informants had identified him as a potential seller for a controlled buy and how they knew who he was and what car he drove; the police officer who had observed the drug scene, being outside the house in which two of the three controlled buys took place, did not see Taylor hand over the drugs. The buyers' previous knowledge about him related to the accuracy (hence absence of mistake) of their testimony concerning the controlled buys that provided crucial evidence for the government's case.

But clearly the judge should not have allowed the officer who arrested Taylor to testify that he had recognized him as a result of having known him "throughout [the officer's] career as a police officer *and as a drug and gang officer*" (emphasis added). There was no doubt of the identity of the arrested person.

The government offers two other reasons for the admission of this damaging testimony, which implied that Taylor had a long history of drug and gang activity. First, the officer had arrested him after observing illegal tinting on his car windows and an illegal tinted cover on his rear license plate. But the officer testified that he had not made the decision to arrest for so trivial a traffic offense until he recognized that it was Taylor's car. He also testified that he knew there was an outstanding

warrant for Taylor's arrest (on what charge the jury was not told).

That evidence was at once irrelevant and damaging, as was the officer's testimony about his prior professional knowledge of Taylor. It is not as if the government had to try to justify the arrest on the basis not of the traffic offenses but of suspicion that Taylor was a drug dealer. Not only was the legitimacy of the arrest for the traffic offenses not questioned; it was an issue for the judge rather than for the jury to decide. *United States v. McKinney*, 919 F.2d 405, 414 (7th Cir.1990); see *Jones v. United States*, 362 U.S. 257, 264, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960); *United States v. Nunez-Rios*, 622 F.2d 1093, 1098-99 (2d Cir.1980); Fed.R.Crim.P. 12(b)(3)(C).

The government appeals (in Hogsett's case as well) to the principle that bad-act evidence "inextricably intertwined" with admissible evidence may be admitted without regard to the specific exceptions in Rule 404(b), and argues that all the bad-act evidence in Taylor's case was of that character. Although many cases recite the "inextricably intertwined" formula, see, e.g., *United States v. Luster*, 480 F.3d 551, 556-57 (7th Cir.2007), and cases cited in *United States v. Bowie*, 232 F.3d 923, 927-28 (D.C.Cir.2000), it is unhelpfully vague. Courts do not agree on whether it refers to evidence "intrinsic" to the charged crime itself, in the sense of being evidence of the crime, or whether though evidence of another crime it may be introduced in order to "complete the story" of the charged crime. As explained in the *Bowie* opinion,

neither formulation is satisfactory: to courts adopting the former, "inextricably intertwined evidence is intrinsic, and evidence is intrinsic if it is inextricably intertwined," while "the 'complete the story' definition of 'inextricably intertwined' threatens to override Rule 404(b). A defendant's bad act may be only tangentially related to the charged crime, but it nevertheless could 'complete the story' or 'incidentally involve' the charged offense or 'explain the circumstances.' If the prosecution's evidence did not 'explain' or 'incidentally involve' the charged crime, it is difficult to see how it could pass the minimal requirement for admissibility that evidence be relevant. See Fed.R.Evid. 401 and 402." 232 F.3d at 928.

What is true, but irrelevant to this case, is that if a defendant commits two criminal acts at the same time and is charged with only one, the evidence of the charged crime may unavoidably reveal the uncharged one, as in *Ignacio v. People of Territory of Guam,* 413 F.2d 513, 519-20 (9th Cir.1969), and *United States v. Persico,* 425 F.2d 1375, 1384 (2d Cir.1970). In such a case—for example where the defendant assaults a person in the course of buying illegal drugs from him but is prosecuted only for possessing drugs with intent to distribute them, or where he commits an armed robbery but is charged only with being a felon in possession—the evidence of the "other" crime can't be disentangled from the evidence of the charged crime. Or if a defendant makes an issue of his criminal intent, as Taylor initially did by his later-abandoned request for an instruction on simple possession, his previous activities may become relevant

to inferring his state of mind with regard to the current charges. If in the past he possessed small quantities of crack with intent to sell rather than merely to consume, this would be some evidence that his current modest inventory also was not just for his own consumption. Moreover, as we said, the fact that a defendant's buyers had dealt with him previously could explain how they were able to identify him, why they picked him for the controlled buy, and why he was willing to deal with them.

But intent and absence of mistake are express exceptions to the Rule 404(b) bar; there is no need to spread the fog of "inextricably intertwined" over them. Almost all evidence admissible under the "inextricably interwoven" doctrine is admissible under one of the specific exceptions in Rule 404(b), or under the judge-made "no confusion" exception discussed later in this opinion. The objection to "inextricably interwoven" is that its vagueness invites prosecutors to expand the exceptions to the rule beyond the proper boundaries of the exceptions.

The arresting officer's testimony about the real reason for his arresting Taylor does not connect to any of the exceptions. It was just a way of telling the jury that the officer knew Taylor to have been a drug offender and gang member for a long time and that at the time of the arrest Taylor was a wanted criminal. But the violation of Rule 404(b) was harmless. The evidence of Taylor's guilt was overwhelming. Two confidential informants testified that they had bought crack from Taylor in controlled buys set up by the police. A third

witness saw one of those drug deals taking place. The informants' accounts were corroborated by a police officer, while another officer testified that Taylor had had a bag of crack in his possession when he was arrested. Taylor called no witnesses of his own and offered no evidence of innocence. No adverse inference can be drawn from his failure to testify, but a defendant's failure to present any evidence at all can help support a finding of harmless error. E.g., *United States v. Martin*, 391 F.3d 949, 955-56 (8th Cir.2004); *Bond v. Oklahoma*, 546 F.2d 1369, 1376-77 (10th Cir.1976).

Hogsett, our second appellant, was also arrested in his car for a minor traffic offense. His passenger testified that he'd told her they were on their way to "hit a lick" when they were stopped. When asked at trial what that meant, she said it meant that Hogsett was going to sell drugs. That part of her testimony is admittedly relevant to his intent with regard to the crack cocaine found in the car. But she added that the reason she knew what "hit a lick" means is that she had been with the defendant on previous "licks." Again the government invokes the "inextricably intertwined" doctrine, and this time decorates it with reference to the importance of filling "conceptual void[s]" and tells us that "the proffered evidence [how she knew what 'hit a lick' means] form[ed] an integral part of the witness's account of the circumstances surrounding the offenses of which the defendant was indicted." These windy formulas do no work. The justification for asking the witness how she knew what "hit a lick" means is that otherwise the

defense lawyer in his closing argument could have challenged the accuracy of her definition of the term—could have said to the jury how could she know what the term meant when no foundation for her knowledge had been laid? It would have been too late for the government to recall her to the stand to answer the defense lawyer's rhetorical query. So the prosecutor's asking her on direct examination how she knew was proper to show absence of mistake.

The list of permissible uses of bad-acts evidence in Rule 404(b) is introduced by "such as," and so is not exhaustive. *United States v. Cruz-Garcia*, 344 F.3d 951, 955 (9th Cir.2003); *Udemba v. Nicoli*, 237 F.3d 8, 15 (1st Cir.2001); *United States v. Miller*, 895 F.2d 1431, 1435 (D.C.Cir.1990). The aim of the rule is simply to keep from the jury evidence that the defendant is prone to commit crimes or is otherwise a bad person, *Huddleston v. United States*, 485 U.S. 681, 687-89, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988), implying that the jury needn't worry overmuch about the strength of the government's evidence. No other use of prior crimes or other bad acts is forbidden by the rule, and the draftsmen did not try to list every possible other use.

This point is pertinent because a legitimate item to add to the list, which does not have the vice of indefiniteness, is the need to avoid confusing the jury. In both Taylor's and Hogsett's case, had no reason been given for the arrests the jurors might be scratching their heads and might even think that the police had been violating the defendants' rights, by arresting them

without cause, and maybe should be punished by an acquittal. But in neither case was the legality of the arrest questioned. And if it had been, the judge should simply have instructed the jury that the arrest had been proper for reasons that it should not concern itself with; for the legality of the arrest (and hence of the seizure of the drugs found in Hogsett's car when he was arrested) was, as we have noted, an issue for the judge rather than for the jury.

Hogsett raises an additional issue that is unrelated to Rule 404(b). The defense learned before trial that the passenger in Hogsett's car—a key witness for the prosecution to whom we referred previously—had had outstanding state warrants that had been quashed before the trial. Hogsett's lawyer wanted to cross-examine her about them to see whether she might have thought that a federal criminal investigator with whom she had dealt had gotten them quashed, perhaps in implied exchange for her testifying favorably to the prosecution. The judge refused to permit this line of cross-examination after conducting a hearing at which the witness testified that she did not know why the warrants had been quashed; the investigator testified that he had neither promised to help her get them quashed nor done anything to get them quashed, nor so much as hinted to her that he might help her out with them; and the prosecutor assured the judge on the record that the federal government had had no involvement with the warrants.

The judge did not abuse his discretion in barring this line of questioning. You are not permitted to cross-examine a witness about a particular topic without a good-faith belief that the answers will be helpful to your case, as distinct from hoping that the question alone will insinuate a helpful answer ("are you not testifying against the defendant because you believe the prosecutor helped to quash the state warrants against you?"). *United States v. Adames*, 56 F.3d 737, 745 (7th Cir.1995); *United States v. Guay*, 108 F.3d 545, 552-53 (4th Cir.1997). If there is an objection at trial to a question asked on cross-examination, on the ground that there is no good-faith basis for it, and at a sidebar the judge so finds, he must sustain the objection. That in effect is what the judge did here, when the hearing revealed the shot-in-the-dark nature of the proposed cross-examination.

Taylor also raises an issue unrelated to Rule 404(b). He was given the statutory mandatory minimum sentence for possession with intent to distribute more than 50 grams of crack, 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(iii), and argues that the statutory minimum works a denial of equal protection. But he has given us no reason to reexamine our decisions rejecting the argument. *United States v. Spencer*, 160 F.3d 413, 413-14 (7th Cir.1998); *United States v. Westbrook*, 125 F.3d 996, 1010 (7th Cir.1997); *United States v. Lawrence*, 951 F.2d 751, 753-56 (7th Cir.1991); see also *United States v. Garcia-Carrasquillo*, 483 F.3d 124, 134 (1st Cir.2007); *United States v. Burgos*, 94 F.3d 849, 876-77 (4th Cir.1996) (en banc).

AFFIRMED.

APPENDIX B — *UNITED STATES v. HOGSETT*, No. 05-30196 WDS, T. Tr. Vol. II, 29-31, January 10, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

05-30196-WDS
East St. Louis, Illinois
January 10, 2007

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAMUEL HOGSETT,

Defendant.

JURY TRIAL VOLUME II
BEFORE THE HONORABLE
WILLIAM D. STIEHL
UNITED STATES DISTRICT JUDGE

[commencing at page 29]

Q. Now by inference here, your authority to arrest, you told the officers about this, and by this I'm referring to, make it singular, Paletto, in the first incident, do with whatever you want?

A. Yes.

Q. It's his decision, not your authority. It's their jurisdiction?

A. Yes.

Q. It's their charge?

A. Yes.

Q. And was it the same with respect to the second matter?

A. Yes.

MR. DALY: All right. I have nothing else, Your Honor.

THE COURT: All right. Thank you, Special Agent.

THE WITNESS: Thank you.

THE COURT: All right. I have reviewed Defendant's Exhibits 10 and 11, and I've listened to counsel's argument earlier, and now I've heard the testimony of both the witness Tyesha Ford and Special Agent Heiser; and I have not seen or heard any evidence of an actual attempt to offer to this Defendant — I'm sorry — to this witness, Tyesha Ford, any benefit or any other incident, any other emolument, or inducement. Based on her expected testimony and cooperation with the Government, I do not believe there is sufficient here

[30] to support the Defendant's Motion, and I deny it. I'm not going to allow an inquiry into these two warrants and their suspension.

MR. GOMRIC: May I?

THE COURT: Yes, sir.

MR. GOMRIC: So as to avoid any interruption during the testimony, the Defendant would respectfully make an offer of proof relative to Defendant's 10, as well as to Defendant's 11, and in reference to testimony, both during the testimony of Ford as well as Heiser. So we would simply ask to make an offer of proof.

THE COURT: This offer of proof that you wish to make in connection with — what is your offer of proof? Is it something that had been made to me I might have changed my mind on this?

MR. GOMRIC: It is our — we have proffered this information to the Court. We acknowledge the Court's order relative to the topic. We appreciate the Court's order. We simply respectfully suggest to the Court that the topics that have been pertinent to this testimony are going to be in fact admissible, and we would make an offer of proof as to benefits relative to the warrant status.

THE COURT: All right. You may make that offer of proof, of course that may be outside the presence of the

jury, and you can do that after the Defendant — after Ms. Ford's [31] testimony.

MR. GOMRIC: Thank you, Your Honor.

THE COURT: All right. Anything else?

MR. DALY: Not on behalf of the Government, Your Honor.

THE COURT: All right. Then we'll have the jury and then if you'll have your witness.

MR. DALY: Yes.

(Open court, jury present.)

THE COURT: Before we start, ladies and gentlemen, I have two apologies that I want to make to you. The first one is that I didn't realize that I had failed to tell you that we were not going to be in session this morning, and there was a reason for it, that I was otherwise occupied. And so I didn't mention it until we recessed yesterday, and I'm sorry, I meant to give you a little bit more warning about that to you, but I suspect that you weren't too mad about not coming in early this morning.

And second one, too, we held up the proceedings so long, it was unanticipated, we had matters that we had to dispose of relative to the trial, which we have now done.

So we're ready to go ahead. And Mr. Daly, if you're ready, we'll be pleased to hear your next witness.

MR. DALY: Thank you, Your Honor.

APPENDIX C — *UNITED STATES v. HOGSETT*, No. 07-1939 (7th Cir. June 30, 2008) (ORDER)

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 30, 2008

Before

Richard A. Posner, *Circuit Judge*

Kenneth F. Ripple, *Circuit Judge*

Daniel A. Manion, *Circuit Judge*

No. 07-1939

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SAMUEL R. HOGSETT,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Illinois

No. 05-30196-WDS

William D. Stiehl, *Judge.*

Appendix C

ORDER

On April 17, 2008, defendant-appellant filed a petition for rehearing and petition for rehearing *en banc*. All of the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*. The petition is therefore DENIED.

Supreme Court, U.S
FILED
JAN 7 - 2009
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(2)

No. 08-357

In the Supreme Court of the United States

SAMUEL R. HOGSETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court violated petitioner's Sixth Amendment rights by limiting his cross-examination of a government witness.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 11

TABLE OF AUTHORITIES

Cases:

Bui v. *DiPaolo*, 170 F.3d 232 (1st Cir. 1999), cert. denied, 529 U.S. 1086 (2000) 7

Delaware v. *Fensterer*, 474 U.S. 15 (1985) 7

Delaware v. *Van Arsdall*, 475 U.S. 673 (1986) 6, 7, 8, 9

Henry v. *Speckard*, 22 F.3d 1209 (2d Cir.), cert. denied, 513 U.S. 1029 (1994) 9, 10

Searcy v. *Jaimet*, 332 F.3d 1081 (7th Cir. 2003), cert. denied, 540 U.S. 1192 (2004) 11

Taylor v. *United States*, 129 S. Ct. 190 (2008) 5

United States v. *Sampol*, 636 F.2d 621 (D.C. Cir. 1980) 9, 10

Constitution and statutes:

U.S. Const.:

Amend. VI (Confrontation Clause) 6

18 U.S.C. 922(g)(1) 1

18 U.S.C. 924(c) 2

18 U.S.C. 924(e) 1

Statutes—Continued: Page

21 U.S.C. 841(a)(1) 2
28 U.S.C. 2254 9

In the Supreme Court of the United States

No. 08-357

SAMUEL R. HOGSETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 522 F.3d 731.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 2008. A petition for rehearing was denied on June 30, 2008 (Pet. App. 17a-18a). The petition for a writ of certiorari was filed on September 17, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted on one count of being a previously convicted felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1) and 18 U.S.C. 924(e) (Count 1); one count of possessing

cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 2); and one count of possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c) (Count 3). He was sentenced to 355 months of imprisonment. The court of appeals affirmed. Pet. App. 1a-11a.

1. On July 16, 2005, petitioner and Tyesha Ford were driving through East Alton, Illinois. Gov't C.A. Br. 4. Police Officer Christian Cranmer stopped petitioner's car for a traffic violation. *Ibid.* During the stop, petitioner consented to a search of his car. *Ibid.* Officer Cranmer found two baggies of crack cocaine and a gun in the car. *Ibid.*

A superseding indictment charged petitioner with being a previously convicted felon in possession of a firearm; possessing cocaine with intent to distribute it; and possessing a firearm in furtherance of a drug trafficking crime. Gov't C.A. Br. 4.

2. At trial, outside the presence of the jury, petitioner's counsel offered a "Motion in Limine/Offer of Proof" with respect to witness Ford. 1/10/07 Tr. 2 Counsel sought to cross-examine Ford "as to what the defense believe[d] to be benefits that may have been received by Ms. Ford" during the pendency of the case against petitioner. *Ibid.* Counsel suggested that Ford might have had state misdemeanor warrants against her recalled or quashed after Ford talked to the federal prosecutor about petitioner's case. *Id.* at 2-7. Government counsel responded that the federal government "had no involvement in these warrants [or] the quashing of them." *Id.* at 7. He added, "as an officer of the Court," that the government "had nothing to do, nor * * * promised any benefits or anything with relationship" to the matters involving Ford. *Id.* at 8.

On the basis of the parties' arguments, the district court indicated that it was inclined to deny petitioner's motion because there was not a sufficient basis for the proposed questions. 1/10/07 Tr. 11-12. Before ruling on the motion, however, and in an abundance of caution, the district judge decided to talk to Ford outside the presence of the jury. *Id.* at 10. Ford was sworn as a witness, and the court proceeded to question her about the state warrants. *Id.* at 13. Ford testified that she knew nothing about one warrant against her that was recalled. *Id.* at 15. For two other warrants, she received new court dates. *Id.* at 16. Petitioner's counsel and government counsel then cross-examined her. *Id.* at 17-23. Ford said that she had told Agent Heiser that she had two outstanding warrants and that Agent Heiser told her that she would have to "clear that up" before testifying in petitioner's case. *Id.* at 22-23. In response to a follow-up question from the court, Ford testified that Agent Heiser had not told her that he would take care of the warrants for her. *Id.* at 23.

The court then questioned Agent Heiser. 1/10/07 Tr. 23-26. The court asked Agent Heiser whether he had "made any agreement with [Ford] or indicated to her that if she cooperates with the Government, that [he] would try to get the Madison County authorities or the Alton Police Department to take steps to dismiss these matters." *Id.* at 25. Agent Heiser responded, "Absolutely not." *Ibid.* The prosecutor subsequently asked Agent Heiser whether he had ever promised any benefit to Ford, and again Heiser responded, "Absolutely not." *Id.* at 28.[1]

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[1] Agent Heiser did indicate that he spoke to Officer Paletto of the Alton Police Department about Officer Paletto's need to take care of

After hearing from Ford and Agent Heiser, the district court denied petitioner's motion in limine, explaining that the court had "not seen or heard any evidence of an actual attempt to offer * * * this witness, Tyesha Ford, any benefit or * * * inducement." 1/10/07 Tr. 29. The judge added that he did "not believe there is sufficient [evidence] here to support [petitioner's] Motion, and I deny it. I'm not going to allow an inquiry into these two warrants and their suspension." *Id.* at 29-30.

At the conclusion of the four-day jury trial, petitioner was convicted on all three counts. Pet. C.A. Br. 3; Gov't C.A. Br. 3. He was sentenced to 295 months of imprisonment on the felon-in-possession count, to run concurrently with a 240-month term on the drug trafficking count, and to run consecutively with a 60-month term on the Section 924(c) count, for a total of 355 months of imprisonment. Judgment 2; Gov't C.A. Br. 3. He was additionally sentenced to five years of supervised release and was ordered to pay a $750 fine and a $300 special assessment. Gov't C.A. Br. 3.

3. The court of appeals affirmed in a single opinion that addressed two different appeals from unrelated cases that presented overlapping issues. Pet. App.

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the warrants (for example, by arresting Ford if he needed to do so), but that Agent Heiser could not be involved. 1/10/07 Tr. 24. According to Agent Heiser, Officer Paletto stated that he would reschedule the first warrant. *Ibid.* With regard to the other warrants, Agent Heiser stated that he spoke to Officer Paletto and that Officer Paletto said that he had contacted the clerk's office, which, upon learning that Ford's address had changed, reset a new court date. *Id.* at 24-25. Agent Heiser did not state that Ford was made aware of his conversations with Officer Paletto, and no evidence supports the conclusion that she was aware.

1a-11a.[2] As relevant here, petitioner argued that the district court erred in failing to allow him to cross-examine Ford about the outstanding state warrants that had been quashed before his trial. *Id.* at 10a-11a. The court of appeals explained that the district court had announced its evidentiary ruling after the witness had testified during voir dire "that she did not know why the warrants had been quashed"; a federal investigator had "testified that he had neither promised to help [the witness] get them quashed nor done anything to get them quashed"; and "the prosecutor assured the judge on the record that the federal government had had no involvement with the warrants." *Id.* at 10a.

Under those circumstances, the court of appeals held that the district judge "did not abuse his discretion in barring" the line of questioning that petitioner's counsel sought to pursue. Pet. App. 11a. The court of appeals explained that an attorney is "not permitted to cross-examine a witness about a particular topic without a good-faith belief that the answers will be helpful." *Ibid.* Indeed, as the court of appeals noted, the district court was required to disallow the line of questioning "when the hearing revealed the shot-in-the-dark nature of the proposed cross-examination." *Ibid.*

4. In a petition for rehearing, petitioner renewed his argument that he had a good-faith basis to inquire about Ford's potential bias. Pet. for Reh'g 10-14. Petitioner acknowledged "that trial counsel must have a good faith factual basis to cross-examine a witness about a matter." *Id.* at 10. Petitioner, however, claimed that "counsel was able to articulate a reasonable suspicion based upon

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[2] This Court denied the petition for a writ of certiorari filed by the defendant in the other case. *Taylor* v. *United States*, 129 S. Ct. 190 (2008).

an objective factual predicate—his good faith basis—as to why Ms. Ford was potentially biased against" petitioner. *Id.* at 13. According to petitioner, the court of appeals' opinion "disregard[ed] the important distinction between a good faith basis for asking a question, on the one hand, and the existence (or not) of witness bias resulting from favorable treatment, on the other." *Id.* at 14. Based on the district court's alleged error in not allowing petitioner to cross-examine Ford about her alleged bias, petitioner contended that his convictions on Counts 2 and 3 (but not Count 1) should have been reversed. *Ibid.* The court of appeals denied the petition for rehearing. Pet. App. 17a-18a.

ARGUMENT

Petitioner contends (Pet. 8-23) that the court of appeals erred in holding that the district court did not violate his rights under the Confrontation Clause by limiting his cross-examination of Ford. He argues that the decision of the court of appeals is in conflict with a decision of this Court and with the decisions of two other courts of appeals. Those claims lack merit and do not warrant review by this Court.

1. The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." U.S. Const. Amend. VI. "It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986). "On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such

cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Ibid.* "[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware* v. *Fensterer*, 474 U.S. 15, 20 (1985) (per curiam); see *Bui* v. *DiPaolo*, 170 F.3d 232, 242 (1st Cir. 1999) ("The threshold requirement imposed by the Confrontation Clause is satisfied as long as the defendant is given a fair chance to inquire into a witness's bias. A criminal defendant is not regarded as being deprived of that chance if a trial court legitimately determines that his cross-examination is inappropriate." (citations omitted)), cert. denied, 529 U.S. 1086 (2000).

Petitioner contends (Pet. 8-12) that the court of appeals' ruling that the district court did not abuse its discretion in barring questioning about the witness's quashed warrants conflicts with this Court's decision in *Van Arsdall*. Petitioner's contention lacks merit and does not warrant this Court's review.

In *Van Arsdall*, the witness acknowledged that a charge against him "had been dropped in exchange for his promise to speak with the prosecutor" about the crime in question. 475 U.S. at 676. The Court held that a violation of the Confrontation Clause occurred because "the trial court prohibited all inquiry into the possibility that [the prosecution witness] would be biased as a result of the State's dismissal of his pending * * * charge." *Id.* at 679. The Court explained that by cutting off inquiry into "an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecu-

tion in his testimony, the court's ruling violated respondent's rights secured by the Confrontation Clause." *Ibid.*

In the present case, by contrast, petitioner concedes that there was no such evidence of a quid pro quo between the witness and the prosecution. Pet. 9. In the absence of such evidence, the direct holding of *Van Arsdall* has no application.

Petitioner attempts to circumvent the lack of evidence of a quid pro quo between the witness and the prosecution by suggesting that the voir dire of the witness in question "adduced evidence from which a reasonable jury might draw the inference that the witness's testimony was colored by a perceived quid pro quo." Pet. 9. That claim, however, is both speculative and fact-intensive, and thus does not present a legal question warranting this Court's review. In any event, a judge has latitude to exclude evidence that is at best "marginally relevant," *Van Arsdall*, 475 U.S. at 679, and the speculative inference that petitioner identifies falls into that category. Ford testified that she was unaware that one warrant was recalled (1/10/07 Tr. 15) and that she rescheduled her court date on the other warrants by speaking with the clerk after being advised by Officer Paletto to do so (*id.* at 16). No evidence supports the conclusion that she perceived receiving a benefit in those cases as a result of her testifying in petitioner's case.[3]

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[3] Petitioner claims that the alleged "violation of [his] Sixth Amendment rights cannot be said to be harmless error" (Pet. 10), but the court of appeals did not reach that issue because it found no error at all. For the same reason, there is no occasion for this Court to consider any issue of harmlessness. In any event, because the probative value (if any) of petitioner's line of questions was so weak, the denial of cross-examin-

2. Petitioner further contends (Pet. 13-23) that the standard used by the court of appeals in determining that there was no "good-faith basis" (Pet. App. 11a) for the line of cross-examination that petitioner sought to pursue "directly conflicts with the standards used by other circuits." Pet. 14. Again, petitioner's claim is unavailing.

In support of his alleged claim of conflict, petitioner cites (Pet. 14, 18) two cases from other courts of appeals. See *Henry* v. *Speckard*, 22 F.3d 1209 (2d Cir.), cert. denied, 513 U.S. 1029 (1994); *United States* v. *Sampol*, 636 F.2d 621 (D.C. Cir. 1980) (per curiam). Those cases do not create a circuit conflict.

Henry arose on a habeas petition under 28 U.S.C. 2254, and the State did "not dispute * * * that the trial court's refusal to permit Henry's counsel to question" a witness on a matter that could reflect on the potential bias of the witness "was error." *Henry*, 22 F.3d at 1214; see *id.* at 1215 (citing *Van Arsdall*, 475 U.S. at 680). In *Henry*, the issue was whether the defense could ask a witness whether she harbored resentment from being asked to baby-sit. There was no dispute that she had baby-sat; the issue was whether the witness could be asked about feelings of resentment even though she had denied such feelings in a proffer. *Ibid.* The court held that "[t]he witness may well answer bias-probing questions in the negative; but the matter of whether her answers should be believed or disbelieved is within the sole province of the jury." *Ibid.* Here, in contrast, there was no factual predicate that Ford either received a benefit or perceived that she did; accordingly, the purported

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ation was harmless beyond a reasonable doubt. See *Van Arsdall*, 475 U.S. at 584 (recognizing that harmless-error review applies to Confrontation Clause violations).

bias-probing questions would have required the jury to spectate about the underlying events that supposedly produced the bias. In any event, the Second Circuit concluded that the trial court's error was harmless, determining "in light of the evidence that was in fact elicited, that the unavailability of the evidence that could have been realized through the proposed questioning" did not have "any substantial influence on the jury's conclusion that * * * Henry was guilty." *Id.* at 1216.

In *Sampol*, the D.C. Circuit said that a factual basis is not required for all cross-examination: "[a] well reasoned suspicion that a circumstance is true is sufficient." 636 F.2d at 658. The court went on to say that "counsel must have a reasonable basis for asking questions on cross-examination which tend to incriminate or degrade the witness." *Ibid.* Although petitioner claims that even the higher "reasonable basis" standard set forth in *Sampol* for incriminating questions is "substantially lower" (Pet. 18) than the "good-faith basis" test employed by the court of appeals below (Pet. App. 11a), nothing in *Sampol* supports petitioner's claim. Indeed, the *Sampol* opinion emphasized that asking incriminating questions requires "some facts which support a genuine belief that the witness committed the offense." 636 F.3d at 658 (citation omitted). The difference between the "reasonable basis" and "good-faith basis" tests thus appears to be a matter of semantics, not a substantively different threshold for the admission of evidence. Petitioner makes no showing that the linguistic differences in the standards applied by the courts of appeals have produced conflicting results. Indeed, in both this case and *Sampol*, the evidence in question was excluded by the district court and the court of appeals affirmed.

Petitioner instead relies on a dissenting opinion in another Seventh Circuit case to support his argument that a defendant should be allowed to cross-examine a witness on a speculative theory of bias even after the trial court has conducted a hearing and determined that there is no basis for the proposed line of questioning. Pet. 18-21 (discussing *Searcy* v. *Jaimet*, 332 F.3d 1081, 1092-1094 (7th Cir. 2003) (Cudahy, J., dissenting), cert. denied, 540 U.S. 1192 (2004)). To the extent the *Searcy* dissent provides any support for petitioner's argument, that view was rejected by the majority in that case, and it has not been endorsed by any other court of appeals. Accordingly, there is no conflict warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2009

Supreme Court, U.S.
FILED
JAN 16 2009
OFFICE OF THE CLERK

No. 08-357

IN THE
Supreme Court of the United States

SAMUEL R. HOGSETT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
PETITIONER'S REPLY BRIEF 1
CONCLUSION 14

TABLE OF AUTHORITIES

CASES **Page(s)**

Bui v. DiPaolo,
170 F.3d 232 (1st Cir. 1999) 7, 8, 9

Davis v. Alaska,
415 U.S. 308 (1974).....3, 4, 5, 6, 7

Delaware v. Fensterer,
474 U.S. 15 (1985).....7

Delaware v. Van Arsdall,
475 U.S. 673 (1986).....2, 4, 5

Douglas v. Alabama,
380 U.S. 415 (1965).....4, 7

Henry v. Speckard,
22 F.3d 1209 (2d Cir. 1994) 9, 10, 11

Searcy v. Jaimet,
332 F.3d 1081 (7th Cir. 2003).....10, 11

United States v. Fowler
465 F.2d 664 (D.C. Cir. 1972).....12

United States v. Sampol,
636 F.2d 621 (D.C. Cir. 1980).....11, 12

United States v. Taylor,
522 F.3d 731 (7th Cir. 2008).....1, 5, 11, 12

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PETITIONER'S REPLY BRIEF

The Court of Appeals for the Seventh Circuit concluded that Petitioner Samuel R. Hogsett's defense counsel was not permitted to cross-examine a key government witness about a potential source of pro-prosecution bias "without a good-faith belief that the [witness's] answers will be helpful to [the defendant's] case." *United States v. Taylor*, 522 F.3d 731, 736 (7th Cir. 2008). In its Brief in Opposition to

the petition for a writ of certiorari, Respondent asserts two principal arguments in support of its position that the Petition should be denied. First, Respondent contends that because "there was no . . . evidence" that government prosecutors had offered Ms. Ford a *quid pro quo* for her testimony against Mr. Hogsett, "the direct holding" of this Court's decision in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), has "no application" to Petitioner's case, and thus there was no violation of Petitioner's right to cross-examine a key witness for bias under this Court's Confrontation Clause jurisprudence. (Opp. Br. at 8; *see also id.* at 6-7.) Respondent also denies that the Seventh Circuit's determination that Petitioner had no good faith basis to raise the question of Ms. Ford's potential bias imposes a higher threshold for bias-related questioning that conflicts with the standards utilized by other appellate courts. (*Id.* at 9; *see also id.* at 10-11.) Respondent concludes that the Sixth Amendment issue that Petitioner presents is fact-intensive and speculative and therefore does not warrant this Court's review. (*Id.* at 8.)

For the reasons that follow, Petitioner respectfully disagrees. The legal issues implicated by the Seventh Circuit's decision fall squarely within, and run contrary to, this Court's Confrontation Clause jurisprudence. Accordingly, Petitioner requests that his Petition be granted, and that the parties be directed to address the merits of Petitioner's claims.

1. The Government's contention that Petitioner's Sixth Amendment claim is somehow

speculative or fact-bound and therefore inappropriate for certiorari review ignores this Court's clear precedent.

As an initial matter, the record belies the Government's contention that the Sixth Amendment issue that Mr. Hogsett presents in his Petition is an invitation for this Court to engage in a fact-intensive inquiry. (Opp. Br. at 8.) The facts pertinent to Mr. Hogsett's Petition are not in dispute. Mr. Hogsett's trial counsel established the factual predicate for his bias theory during the district court's *voir dire*. Testimony was elicited demonstrating: (1) the existence of Ms. Ford's warrants; (2) Ms. Ford's concerns regarding her employment in light of the warrants; (3) Ms. Ford's conversations with law enforcement officials about the warrants; and (4) the timing of certain law enforcement acts and omissions with respect to those warrants that benefited Ms. Ford. (Pet. at 4-5.) Mr. Hogsett's trial counsel properly sought to use these facts "to show [the jury]—or at least argue—that [Ms. Ford] acted out of fear or concern" in testifying against Mr. Hogsett. *Davis v. Alaska*, 415 U.S. 308, 311 (1974). Having established this factual predicate, Petitioner should have been permitted to cross-examine Ms. Ford about her potential pro-prosecution bias. *See id.* at 318 (the right of effective cross-examination requires that defense counsel be permitted to "make a record from which to argue [to the jury] why [the witness] might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial").

Respondent's further contention that Petitioner's claim is speculative (Opp. Br. at 8) cannot be

reconciled with this Court's precedent. Under *Davis v. Alaska*, it is not necessary that the Court "speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted [Mr. Hogsett's defense counsel's] line of reasoning had counsel been permitted to fully present it." 415 U.S. at 317. The constitutional issue presented by Mr. Hogsett's Petition is concrete and direct: having established the factual predicate for his proposed line of inquiry, does the Sixth Amendment provide Petitioner with the right to present to the jury his theory of bias "so that they could make an informed judgment as to the weight to place on . . . testimony" that provided "'a crucial link in the proof" the Government offered against Petitioner? *Id.* (quoting *Douglas v. Alabama*, 380 U.S. 415, 419 (1965)). As this Court explained in *Van Arsdall*, a "criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness." 475 U.S. at 680. Accordingly, this Court need not and should not speculate as to how the jury would have ultimately received Mr. Hogsett's evidence in order to resolve his Sixth Amendment claim.

In addition, Mr. Hogsett's Petition most certainly presents an important legal issue that warrants this Court's review. The Seventh Circuit applied a legal standard to Mr. Hogsett's Sixth Amendment claim that eviscerated the protections of the Confrontation Clause. Under the Seventh Circuit's newly-announced standard of bias-evidence admissibility, trial judges presiding over criminal

proceedings are permitted to *voir dire* prosecution witnesses to screen the witness's responses to questions directed at exposing bias. Based on those answers, it is the trial judge, rather than the jury, who makes credibility determinations, draws inferences, and decides whether those "answers will be helpful to [the defendant's] case." *Taylor*, 522 F.3d at 736.

Under the Seventh Circuit's answer-based standard, if a prosecution witness simply denies being biased during *voir dire*, and the trial judge finds the denial credible, the trial judge may completely prevent a criminal defendant from cross-examining the witness on the topic of potential bias in front of the jury. This procedure cannot be reconciled with the mandates of the Confrontation Clause, which reserves credibility determinations for the jury as part of a criminal defendant's right to cross-examine the witnesses against him. *See Van Arsdall*, 475 U.S. at 680; *Davis*, 415 U.S. at 318. Simply put, the application of the Seventh Circuit's standard violated Mr. Hogsett's Sixth Amendment rights and threatens to violate the constitutional rights of countless other criminal defendants.

2. The Government's attempt to distinguish and marginalize *Delaware v. Van Arsdall* is unavailing. In *Van Arsdall*, "the trial court prohibited *all* inquiry into the possibility that [a government witness] would be biased as a result of the State's dismissal of his pending public drunkenness charge." 475 U.S. at 679. This Court held that the complete prohibition violated the defendant's rights under the Confrontation Clause

because it prevented questioning regarding an event "that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony." *Id.* As in *Van Arsdall*, the trial court here prohibited all inquiry into the possibility that Ms. Ford might be biased as a result of the pre-trial disposition of her warrants. The jury, however, might reasonably have found that the accommodations afforded her in connection with her warrants, the timing of those accommodations, and her concern about her employment furnished her with a motive for slanting her testimony in favor of the prosecution. The trial court's ruling and the Seventh Circuit's cross-examination standard cannot survive this Court's holding in *Van Arsdall*.

Respondent appears to suggest that *Van Arsdall* does not apply here because there was "no . . . evidence of a *quid pro quo* between [Ms. Ford] and the prosecution." (Opp. Br. at 8.) As an initial matter, Mr. Hogsett has not "concede[d]" there is no evidence regarding a *quid pro quo*: substantial circumstantial evidence was adduced during *voir dire* that would have permitted the jury to infer that Ms. Ford's testimony was motivated by her perception of some type of *quid pro quo* agreement. Respondent's attempt to distinguish *Van Arsdall* on this basis ignores the fact that the witness in *Van Arsdall* "denied that the agreement had affected his testimony." 475 U.S. at 676. The existence (or not) of a *quid pro quo* and the possibility that it might have affected a witness's testimony is a matter for the jury; it is not a prerequisite to a finding of a Sixth Amendment violation. Accordingly, the trial court here constitutionally erred by removing from the

jury the opportunity to infer from specific facts that Ms. Ford's testimony was biased.

3. Respondent's reliance on *Delaware v. Fensterer*, 474 U.S. 15 (1985) (*per curiam*), is misplaced. *Fensterer* does not address witness bias, and the Court expressly noted that the case did not fall into the category of cases, like *Davis*, that involved a restriction on cross-examination. *Id.* at 19. Indeed, in *Fensterer*, the trial court did not "limit the scope or nature of defense counsel's cross-examination in any way." *Id.* Here, in contrast, the trial court completely foreclosed defense counsel's cross-examination of a key government witness on an important avenue of bias.

Moreover, *Fensterer* specifically recognizes that "the assurances of reliability [this Court's] cases have found in the right of cross-examination are fully satisfied . . .[where] the factfinder can observe the witness' demeanor under cross-examination, and the witness is testifying under oath and in the presence of the accused." *Id.* at 20; *see also, e.g.*, *Douglas*, 380 U.S. at 419 (noting that the Confrontation Clause compels a witness "'to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief'") (citation omitted). *Fensterer* thus supports the arguments set forth in Mr. Hogsett's Petition.

Respondent's reliance on the First Circuit's opinion in *Bui v. DiPaolo*, 170 F.3d 232, 242 (1st Cir. 1999), likewise is misplaced. Though *Bui* obviously is

not binding on this Court, Respondent quotes *Bui* for the proposition that "'[t]he threshold requirement imposed by the Confrontation Clause is satisfied as long as the defendant is given a fair chance to inquire into a witness's bias.'" (Opp. Br. at 7 (quoting *Bui*).) Yet the whole point of Mr. Hogsett's Petition is to remedy the fact that he was *not* given his "fair chance" to cross-examine Ms. Ford regarding possible bias.

Although the First Circuit noted that "[o]ne well-established basis for circumscribing cross-examination is a party's inability to lay a proper evidentiary foundation for the questions that he wishes to pose," there had been no evidence in the *Bui* trial court "even remotely supporting the petitioner's offer of proof." *Bui*, 170 F.3d at 243. "When the court inquired into the predicate for the offer, counsel did not cite any evidence, but replied instead that he had a good-faith basis founded on attorney-client privilege." *Id.* On appeal, however, the First Circuit concluded that the appellant's purported evidence "sa[id] nothing" about the subject or purpose of the proposed cross-examination. *Id.* at 243 n.7. In contrast, Mr. Hogsett's trial counsel did lay a proper evidentiary foundation, after which the trial judge improperly made credibility determinations and drew inferences that were the proper province of the jury.

Ultimately, *Bui* (like *Fensterer*) supports the arguments set forth in Mr. Hogsett's Petition, in part because the First Circuit's admissibility standard conflicts with the standard that the Seventh Circuit applied in Mr. Hogsett's case. In addressing

defendant Bui's Sixth Amendment claim, the court of appeals cautioned:

> We do not mean to suggest that a criminal defendant must testify in his own behalf, or alternatively, that he must arm himself with irrefutable proof before he may cross-examine witnesses about a particular bias. We do believe, however, that a defendant in such circumstances must present a satisfactory foundation for the critical elements on which his hypothesis of bias depends.

Bui, 170 F.3d at 245. The First Circuit's predicate showing for bias-related cross-examination is substantially lower than the "answers will be helpful" standard the Seventh Circuit applied in Petitioner's case. As set forth above and in Mr. Hogsett's Petition, because Mr. Hogsett's trial counsel established an evidentiary foundation for his bias theory, counsel would have been able to cross-examine Ms. Ford concerning the warrants under the standard in *Bui*.

4. There is no merit to the Government's contention that Mr. Hogsett's Sixth Amendment claim would not have been decided differently under the standard set forth in *Henry v. Speckard*, 22 F.3d 1209 (2d Cir. 1994). The Government attempts to distinguish *Henry* by arguing that "there was no factual predicate that Ford either received a benefit or perceived that she did." (Opp. Br. at 9-10.) This argument, however, is predicated on the assumption

that Ms. Ford's denials were truthful; the argument also disregards the other bias-related evidence adduced during the *voir dire* and referenced above. (Pet. at 4-5; *see also supra* at 3.) Under the Second Circuit's standard in *Henry*, the establishment of these predicate facts would have entitled Mr. Hogsett's defense counsel to cross-examine Ms. Ford regarding her warrants. *See Henry*, 22 F.3d at 1215 ("There was plainly a foundation for the proposition that she had performed baby-sitting chores."). Whether or not Ms. Ford received a benefit or perceived she received a benefit was ultimately a question for the jury to decide. As in *Henry*, "[t]he witness may well answer bias-probing questions in the negative; but the matter of whether her answers should be believed or disbelieved is within the sole province of the jury." *Id.*

Furthermore, Respondent apparently has misperceived the Petition's reference to the dissenting opinion in *Searcy v. Jaimet*, 332 F.3d 1081 (7th Cir. 2003) (Cudahy, J., dissenting) (Pet. at 18-21), arguing that Petitioner relies on the opinion to "support his argument that a defendant should be able to cross-examine a witness on a speculative theory of bias even after the trial court conducted a hearing and determined that there is no basis for the line of questioning." (Opp. Br. at 11.) In fact, Petitioner analyzed in some detail the *Searcy* dissent to illustrate the significant differences between the Second and Seventh Circuits' standards for admission of bias-related cross-examination testimony.

Judge Cudahy observed in *Searcy* that "[t]he only piece of information not fully verified [in defense counsel's evidentiary foundation] was whether, in fact, the critical information was transmitted" to the prosecution witnesses. 332 F.3d at 1094. Judge Cudahy noted that "[i]n essence, the trial judge refused Searcy his constitutional right to cross-examination simply because [the witnesses] refused to inculpate themselves on the stand" by admitting that they had been told "critical," inculpating information. *Id.* Citing *Henry*, Judge Cudahy explained that "[e]ven if cross-examination of [the witnesses] . . . had resulted in denials, cross-examination would have permitted the jury to observe [the witness'] agitated demeanor when confronted." *Id.* Judge Cudahy recognized the jury's crucial—indeed, exclusive—role in assessing witness demeanor during a cross-examination for potential bias. Like the *Searcy* majority, the Seventh Circuit here disregarded the jury's function during cross-examination in evaluating a Confrontation Clause claim.

Respondent is similarly mistaken when it asserts that the difference between the "reasonable basis" standard employed in *United States v. Sampol*, 636 F.2d 621, 658 (D.C. Cir. 1980), and the "good faith belief" standard employed here by the Seventh Circuit—that is, "[y]ou are not permitted to cross-examine a witness about a particular topic without a good-faith belief that the answers will be helpful to your case," *Taylor*, 522 F.3d at 736—appears to be a matter of semantics, not a substantively different threshold for the admission of evidence." (Opp. Br. at 10.)

Sampol involved three defendants accused of participating with a Cuban dissidents' group in a car bombing. *Sampol*, 636 F.2d at 630-31. Counsel for two of the *Sampol* defendants sought to support their claims of innocence by introducing *modus operandi* evidence through the government's testifying witness. *Id.* at 655-57. After receiving a proffer, the trial judge concluded that the proposed "evidence" was too tenuously linked to the testimony to be elicited from the witness and barred the cross-examination. *Id.* at 657-58. The Court of Appeals for the District of Columbia Circuit upheld the trial court's ruling, observing:

> [C]ounsel must have a reasonable basis for asking questions on cross examination . . . . The general rule in such situations is that "the questioner must be in possession of some facts which support a genuine belief that the witness committed the offense or the degrading act to which the questioning relates."

Id. at 658 (quoting *United States v. Fowler*, 465 F.2d 664, 666 (D.C. Cir. 1972)).

The standard of admissibility employed by the District of Columbia circuit, which focuses on facts possessed by the questioner before asking the question, thus involves a process-based analysis. The Seventh Circuit test, on the other hand, is results oriented, and looks to the usefulness of the actual answers to those questions. *Taylor*, 522 F.3d at 736.

Had the threshold utilized by the trial court in Petitioner's case been restricted to a consideration of the information adduced during the *voir dire*, rather than an assessment of the credibility of the witness in denying bias or a *quid pro quo*, the trial court would have preserved Petitioner's right to have the jury consider the demeanor of the witness in responding to the proposed line of questions. This difference therefore is not simply a "matter of semantics," as Respondent contends, but implicates core principles of this Court's Confrontation Clause jurisprudence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 16, 2009